to Families of the Working Poor, N. J. S. A. 44:13-1, *et seq.*, programs, which Petitioners have also challenged, are totally state funded. See Petitioners' brief, p. 4, n. 1. The present state programs, moreover, contain a substantially different support scheme than A. F. D. C.; these programs cannot simply be viewed as "essentially auxiliary and supplementary" or "parallel" (State brief, pp. 12-13; AFL-CIO brief, p. .....) to the A. F. D. C. program. For example, while A. F. D. C. benefits are not paid for the first thirty days of unemployment (42 U. S. C. § 607(c); App., p. 120), the New Jersey assistance programs contain no such limitation. The strikers in the instant case, from the commencement of the strike on May 14, 1971 through June 10, 1971 when this action was filed, were eligible only for state-funded assistance.[7] This difference, in view of the relative short duration of most strikes (see n. 5, *supra*), is critical. Regardless, therefore, of whether Congress has acted with respect to the question of A. F. D. C. assistance to strikers, an issue to be discussed *infra*, state programs outside its control which intrude upon the federal labor scheme must fall. See *Perez* v. *Campbell*, 402 U. S. 637, 651-652 (1971).

2. The State and AFL-CIO also err in assuming that a

serve, except as expressly sanctioned by Congress, the *status quo ante bellum*. It may not "devastat[e]" either the right to strike (see, e.g., *N. L. R. B.* v. *Erie Resistor Corp.*, 373 U. S. 221, 230-231, 236 (1963)), or, as in this case, grant strikers "a potent weapon" with which to achieve their objectives. *John Hancock Mutual Life Insurance Company* v. *Commissioner*, 394 Mass. 390, 208 N. E. 2nd 516, 524-5 (1965). See also *N. L. R. B.* v. *General Electric Co.*, 418 F. 2d 736, 762 (2nd Cir. 1969) (governmental insulation from economic pressure discourages any " ' serious attempt to resolve differences and reach a common ground' . . . [and encourages instead] 'a pre-determined resolve not to budge from an initial position' . . ."); and *Delaware Coach* v. *Public Service Commission*, 265 F. Supp. 648 (Del. 1967).

7. On June 13, 1971, the thirty day A. F. D. C. waiting period expired and the strikers became qualified for A. F. D. C. benefits which were paid for the period through June 28, 1971 when they returned to work. Two days later, on June 30, 1971, the unemployed parent segment of the A. F. D. C. program expired in New Jersey.

joint state-federal cooperative program, like A. F. D. C., insulates any discretionary state decision thereunder from the ambit of the Supremacy Clause. Such an assumption has been repeatedly rejected, at least where national labor policy is involved, by both this Court and others. See, e.g., *Nash* v. *Florida Ind. Com.*, 389 U. S. 235 (1967);[8] *Grinnell Corporation* v. *Hackett*, 475 F. 2d 449 (1st Cir. 1973), *cert den.* 94 S. Ct. 164 (1973); and *Dow Chemical Company* v. *Taylor*, ... F. Supp. ....., 57 F. R. D. 105 (E. D. Mich., *pend.*). Cooperative programs, after all, are only incentive systems by which Congress encourages those states that wish, through the lure of federal matching funds or tax credits, to act in some sphere of activity. See Brown, *Free Will in the Frontiers of Federalism*, 58 Mich. L. Rec. 999, 1010 (1960). Except for certain minimal requirements that are reviewed and certified to have been satisfied by the Department of Health, Education and Welfare (H. E. W.), the states act on their own in expanding the scope of their A. F. D. C. programs.[9] Such additional coverage is of no interst to the reviewing federal agency; neither its "indirect imprimatur" nor its administrative expertise (State brief, pp. 14, 15) is involved. Clearly, therefore, the choice of whether to provide A. F. D. C. subsidies to strikers is a purely state decision.

3. Congress has admittedly not expressly required that states must render A. F. D. C. assistance to strikers. The "most that

8. In *Nash*, this Court applied the Supremacy Clause to a state unemployment compensation statute which had been approved and certified by the federal government pursuant to another joint state-federal cooperative program, the Federal Unemployment Tax Act, 26 U. S. C. §§ 3301-11.

9. This is a far different procedure from that followed in *DeVeau* v. *Braisted*, 363 U. S. 144 (1960), relied on by the State (brief, pp. 14-16), where a "unique" interstate compact was submitted, pursuant to Art. 1, § 10 of the Constitution, to Congress for its consent and approval. As this Court stated, "[t]his was no perfunctory consent. Congress had independently investigated" the problem during extensive hearings. 363 U. S. at 149. This substantial interrelationship and state-federal interdependence is a stark contrast to the instant situation.

can fairly be said," in this area as in the related area of unemployment compensation payments to strikers, "is that Congress has been and presently is aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances." *Grinnell Corporation* v. *Hackett*, 475 F. 2d at 457. The problem of public assistance to strikers, moreover, although a minor concern in the past, has only recently evolved into a major national controversy.[10] And in recent years, where Congress has addressed the problem and intended that welfare benefits intrude upon the collective bargaining process, it has clearly spoken; [11] "given the ability of Congress to articulate that intent in other programs, one might also infer that its silence [in the A. F. D. C. area] . . . was indicative of a contrary intent." *Id.* at 457. This conclusion is particularly compelling here since, as described below, the legislative history of the A. F. D. C. program amply demonstrates that "Congress did not anticipate that the A. F. D. C.-U. program would benefit large groups of persons of proven work ability who were tem-

10. See Thieblot and Cowin, *Welfare And Strikes: The Use of Public Funds to Support Strikers*, Industrial Research Unit, University of Pennsylvania Press (1972), p. 1: "Supporting strikers on a widespread basis with public welfare funds is a relatively recent phenomenon. Although instances of public support for strikers are occasionally found as long ago as the New Deal and such funds were used in the steel industry strike in 1959-60, these were isolated instances. It remained for the strikes of the late 1960's and early 1970's to establish the current trend of increasing use of public welfare in strikes." Fragmentary excerpts of inconclusive legislative history, such as the Mills-Dominick colloquy relied on by the AFL-CIO (brief, p. . . . .), or statements made by New Deal Administration officials (State brief, p. 7) prior to the extensive use of public funds for strikers in recent years, were thus "responsive to a situation totally different from that which exists today." *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235, 250 (1970). See also *Grinnell Corporation* v. *Hackett*, 475 F. 2d at 456 (". . . in the absence of any floor amendment or debate . . . and of any real consideration of the issue at any level, we cannot take [the deletion of various proposals] as a clear indication of the intention of the entire Congress . . .").

11. See, e.g., the Food Stamp Act, 7 U. S. C. § 2014(c), and the Railroad Employment Insurance Act, 45 U. S. C. § 351; see also *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96 (1963).

porarily unemployed . . . [and] did not intend to depart from the practice, nearly universal under unemployment compensation programs, of denying aid to strikers . . ." Comment, *Welfare for Strikers: ITT* v. *Minter*, 39 U. Chi. L. Rev. 79, 90-91 (1971). State assistance to strikers, whether under A. F. D. C. or state funded programs, is, moreover, "inconsistent", as described below, with the actual legislative intent. *Id.* at 97-98.[12]

The entire thrust of the unemployed parent segment of the A. F. D. C. program is aimed at those individuals with a recent connection with the work force who, through training, stood the greatest chance of being "drawn into employability."[13] The legislative history of the program manifestly demonstrates that its primary goal was to provide training for individuals who were involuntarily unemployed, without foregoing welfare assistance,

12. In *New York State Dept. of Soc. Serv.* v. *Dublino*, ... U. S. ...., 93 S. Ct. 2507 (1973), this Court distinguished between cases where states "excluded people from A. F. D. C. benefits whom the Social Security Act expressly provided would be eligible," and situations, as here, where one must measure supplementary state action against the Supremacy Clause. In *Dublino*, the argument that New York's statute conflicted with the federal welfare scheme was rejected because the supplemental programs there involved were found not to conflict with the federal enactment. This finding, however, surely did not constitute an affirmative approval of state supplementary programs sufficient to permit their intrusion upon federal labor policy.

13. See, e.g., remarks of Rep. Machen, 113 Cong. Rec., 90th Cong., 1st Sess. (August 17, 1967), p. 23112. By comparison to this legislative purpose of helping those who, with assistance, will then become able to help themselves, the striking employee is in a markedly different situation. A strike, by its very nature, constitutes concerted economic activity of employees. A striking employee, in contrast to those for whom the A. F. D. C. program was directed, has "control over his family's economic destiny . . . [and] access to collective bargaining [and strikes as a], means of economic persuasion. . . ." *Carleson* v. *Remillard*, 406 U. S. 598, 603 (1972). Should a striker decide to break with the concept of majority rule and defect from a strike, he may, without penalty, frequently resign from the union and return to work. *N. L. R. B.* v. *Granite State Joint Board*, 409 U. S. 213 (1972). A striking employee, in addition, has a federal right to return to a job, retains all of the prestrike rights of that job (see, e.g., *N. L. R. B.* v. *MacKay Radio & Tel. Co.*, 304 U. S. 333 (1938)) and, by virtue of his con-

while they sought to get back into the work force.[14] If, instead, support of the needy was the primary objective, as the State suggests (brief, pp. 5-6), the needy who "have not been in the labor force, or whose attachment to the labor force has been casual," would also have been included. House Report No. 544, 90th Cong., 1st Sess. (1967), p. 108; and see Hearings on H. R. 12080 before the Senate Committee on Finance, 90th Cong., 1st Sess., pp. 264, 269.[15] In accordance with this limited objective, in the 1967 A. F. D. C. amendments, Congress, for the first time, punished individuals who failed to accept work for other than "good cause," a term restricted to physical disabilities or health and safety hazards. 45 C. F. R. 233.100(a)(3)(ii). In sum, as one commentator concludes: "Strikers clearly do not fit within any of the categories of unemployed persons whom Congress attempted to assist through the A. F. D. C.-U. program." Note, 39 U. Chi. L. Rev. at 90.

4. In view of the above-described absence of specific Congressional direction and questionable federal welfare interest in providing assistance to strikers, neither this Court's summary affirmance in *Davidson* v. *Francis*, 409 U. S. 904 (1972), nor

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tinuing employment relationship, has access to financial assistance not available to the truly needy. He should be deemed "employed", accordingly, within the meaning of the A. F. D. C. program consistent with his status as an employee under Section 2(3) of the National Labor Relations Act, 29 U. S. C. § 152(3).

14. See, e.g., 107 Cong. Rec. 3767-3768 (remarks of Cong, Byrnes); *Report of Senate Committee on Finance of ADC Benefits to Children of Unemployed Parents*, 87th Cong., 1st Sess. (1961), Rept. No. 165, p. 3, and Note, 39 U. Chi. L. Rev. at 88-90.

15. Indeed, the fact that Congress never made the unemployed parent segment of the A. F. D. C. program mandatory on every state (see 42 U. S. C. § 607; *King* v. *Smith*, 392 U. S. 309 at n. 3, 7 (1968)) is further proof that Congress did not intend that this program become a panacea for alleviating the needs of the children of all parents who, for any reason, were not presently working. If this had been the concern of Congress, not only would there have been no need for the qualifications of 42 U. S. C. § 607(b)(2)(C)(i) and (ii) and 45 C. F. R. 233.100(a)(3)(iii), but the unemployed parent program would clearly have been extended, as is true of the basic A. D. C. program, to unemployed parents no matter where they reside.

the H. E. W. regulations emanating therefrom (App., pp. 123-125), should be deemed indicative of a federal policy to grant A. F. D. C. assistance to strikers. The issue before this Court in *Davidson* did not, as the State presumes (brief, p. 17), involve any Supremacy Clause contention; Maryland's appeal (No. 71-1447) raised only the question of the District Court's construction of the then applicable H. E. W. regulations while the Chamber's separate appeal (No. 71-1554), which did present the constitutional question, was dismissed on jurisdictional grounds. See also *Francis* v. *Chamber of Commerce of the United States*, ... F. 2d ..... (4th Cir. June 20, 1973). Moreover, the Solicitor General's *amicus* brief in *Davidson*, although disagreeing with the District Court, itself suggested summary affirmance to restore the pre-*Davidson status quo*, i.e., a situation in which neither Congress nor H. E. W. had taken any position and where the federal labor policy and the Supremacy Clause accordingly, remained applicable. In these circumstances, the new H. E. W. regulation "obviously does not constitute an expression of congressional intent which would clearly preclude application of the preemption doctrine in the welfare area . . ." Carney, *The Forgotten Man on the Welfare Roll: A Study of Public Subsidies to Strikers*, 1973 Wash. U. L. Q. 469. 548 (1973).

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in Petitioners' principal brief, it is respectfully requested that this Court (1) reverse the Court of Appeals and (2) reverse the District Court on the merits.

Respectfully submitted,

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